United Nations AT/DEC/1185

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1185

Case No. 1278: VAN LEEUWEN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of Robert Van Leeuwen, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and periodically thereafter until 30 November 2002;

Whereas, on 27 November 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

"II. PLEAS

...

10. ... [T]he Applicant respectfully requests the Administrative Tribunal *to order:*

(a) that, ... the Respondent produce ... documents ...

(b) rescission of the Administration's contested decision ... denying the Applicant his rights ... with respect to reimbursement by the United Nations of national taxes already imposed and paid by him and which will or may in future be imposed and paid by him on the lump sum payment of his United Nations Joint Staff Pension Fund (UNJSPF) withdrawal

settlement, irrespective of the fact that ***this very same payment***, was 'rolled over' into a qualifying Individual Retirement Account (IRA) ...;

...

(d) **that ... the Applicant be reimbursed by the United Nations for ALL taxes already imposed and paid by him and which will or may in future be imposed and paid by him on the lump sum payment of his UNJSPF withdrawal settlement;**

(e) **that the Applicant be paid interest by the United Nations** on the amounts of the reimbursements for taxes imposed and paid by him to the U.S. Internal Revenue Service ... at applicable rates from the times when said reimbursements by the United Nations should have been effected; **and**

(f) **that the Applicant in addition be reimbursed and compensated by the United Nations for:** ... costs ... and ... damages incurred ... and that the Applicant be paid interest on the costs and damages ...

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 28 February 2003;

Whereas the Respondent filed his Answer on 10 March 2003;

Whereas, on 12 April 2003, the Applicant filed Written Observations amending his pleas as follows;

"54. ... [T]he Applicant respectfully requests the Tribunal to adjust the estimated damages so as to include one additional month's salary at level D.1, step VII, duty station Geneva ..."

Whereas, on 21 April 2003, the Applicant submitted two additional communications, one of which amended his pleas as follows:

"... [A]dditional costs ... should be added to the costs ... specified in ... [the] Application ...

... **damages**, ... [in the amount of] ... ***three*** **months of ... remuneration** [at the D-1 step VII level].

..."

Whereas, on 15 June 2004, the Respondent submitted his comments on the Written Observation;

Whereas the facts in the case are as follows:

The Applicant, a United States national, joined the Organization on a one-year fixed-term appointment as a Personnel Officer, at the P-3 level, with the United Nations High Commissioner for Refugees (UNHCR), on 5 September 1976. Following his final assignment as Principal Officer, at the D-1 level, UNHCR, Geneva, effective 15 February 1995, the Applicant was on special leave with full pay.

On 15 June 1995, the Applicant separated from the Organization under an agreed termination. Upon his separation, the Applicant opted for a full withdrawal settlement from the UNJSPF. As a United States national who joined the United Nations prior to 1980, the Applicant was entitled to reimbursement for income taxes paid on partial or full lump-sum pension payments and withdrawal settlements received.

Apparently, in early 1995, in anticipation of his retirement, the Applicant had met with "an official from the UNJSPF" in order to obtain information regarding his projected retirement income and his options with regard to his accumulated funds with the UNJSPF. During this meeting, in addition to the requested information, the Applicant was advised of the existence of JSPB/G.11/Rev. 8 of 11 March 1994, entitled "Guide to National Taxation of United Nations Joint Staff Pension Fund Benefits, With Special Reference to United States Taxes" ("the Guide") and was referred to the Office of Legal Affairs (OLA) in order to obtain a copy thereof. Subsequently, the Applicant contacted OLA and was sent a copy of the said document.

On 24 August 1995, UNJSPF informed the Applicant that an amount of US$247,688.18, representing his withdrawal settlement, would be transferred to his bank account in New York. Apparently, the Applicant subsequently discussed with a Legal Officer, OLA, whether his deposit of the said funds into an Individual Retirement Account (IRA) would effect his entitlement to reimbursement by the Organization of any United States taxes which might be imposed thereon. The Legal Officer informed him that should such "roll-over" occur within 60 days of the Applicant's receiving the funds, it would not constitute a "taxable event" and would not prejudice the Applicant's entitlement to reimbursement due to a "taxable event", with respect to these funds, at any time in the future.

On 23 October 1995, the Applicant "rolled over" the entire amount into an IRA.

On 15 May 1997, the Applicant informed the UNJSPF that he would be withdrawing US$ 60,000 from his IRA, which would result in the United States

withholding a 10 percent tax, i.e., US$ 6,000.00. The Applicant requested confirmation in writing as to his reimbursement entitlements regarding this withdrawal and regarding any future "taxable events" with respect to the funds in his IRA. On 23 May, the UNJSPF responded, informing the Applicant, inter alia:

> "[W]e are sending to you a copy of a Guide to National Taxation of UNJSPF Pension Fund Benefits, prepared by the United Nations Office of Legal Affairs; the Tax Guide makes special reference to the income taxation of UNJSPF pension benefits in the USA.
>
> Any reimbursement of national income taxes that may be payable on certain UNJSPF benefits is done by the former employing organization, the United Nations, through the Income Tax Unit at Headquarters; the Pension Fund is not involved in that process. ... As we understood the [United Nations'] current policy on tax reimbursement, if you had not rolled over your UNJSPF withdrawal settlement into a tax-deferred IRA account, you would have been entitled to reimbursement for any [United States] income taxes (...) that actually became payable when you received your withdrawal settlement. However, there is no subsequent tax reimbursement by the [United Nations] and the [United Nations] will *not* reimburse any income taxes that may become due when you later decide to withdraw sums from the IRA account into which you had deposited your UNJSPF withdrawal settlement."

On 9 March 1998, the Applicant wrote to the Chief, Income Tax Unit, Accounts Division, Programme Planning, Budget and Accounts (OPPBA), informing him that, having made two withdrawals from his IRA, a total of US$ 7,869.55 was withheld for federal income tax. The Applicant referred to the Guide and requested the reimbursement of this sum or, otherwise, that an explanation be provided as to why this amount was not reimbursable. He also requested instructions on how to recover the amount withheld. The Applicant reiterated his request on 2 and 15 April, adjusting the requested reimbursement amount to US$17,889, and, on 21 and 29 April, the Chief, Income Tax Unit, responded, informing the Applicant that, because he chose to "roll-over" his lump sum into an IRA and did not claim any taxable amount on his lump-sum withdrawal, he was no longer eligible for reimbursement of these taxes. The Chief, Income Tax Unit, also referred the Applicant to paragraph 97 of ST/IC/1996/5 of 5 January 1996, which stipulates that the United Nations would not reimburse

> "any future taxes payable on [the taxable amount of pension lump-sum withdrawals] if the income tax liability is deferred to future years because the staff member has 'rolled-over' the payments into ... qualifying IRA account".

On 7 May 1998, the Applicant again wrote to the Chief, Income Tax Unit, and while noting paragraph 97 of ST/IC/1996/5, he requested that his "unusual circumstances" be taken into account. The Applicant therefore requested that an exception be made in his case and that he be reimbursed the taxes paid.

On 14 May 1998, OPPBA rejected the Applicant's request explaining, *inter alia*, that "in all income tax matters [United States] taxpayers employed by the United Nations must refer to annual administrative issuances of the Income Tax Unit rather than documents issued by other offices".

On 27 June 1998, the Applicant requested the Secretary-General to review the administrative decision denying him reimbursement of national tax imposed on his UNJSPF withdrawal settlement.

On 12 October 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Geneva and, on 2 March 2000, he requested the Secretary-General to agree to direct submission of the case to the Administrative Tribunal. On 6 April, the Applicant was informed that, his request for direct submission had been denied.

The JAB adopted its report on 31 August 2000. Its considerations, conclusions and recommendations read, in part, as follows:

> **"Considerations**
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> ...
>
> 68. ... [O]nly ST/IC/1995/3 was applicable ... Moreover ... the annual Information circular on Payment of income taxes was sent directly to the Appellant on a regular basis.
>
> ...
>
> 70. With regard to the Guide, the Panel stressed ... that, although issued as United Nations document, it cannot be attributed the same, if any, legal force as ... Information Circulars.
>
> 71. ... Taking also into account that 'all recipients of UNJSPF benefits must (...) ascertain for themselves what their tax obligations may be' ... it would have been reasonable to consult carefully all the information available and applicable at the time.
>
> 72. Moreover, the Panel has no doubt that if the Appellant had contacted the Income Tax Unit at Headquarters in a timely manner, he would have been provided not only with ST/IC/1995/3 but also additional information as to the possibilities how to proceed after receipt of his lumps sum benefit ...
>
> ...
>
> 74. ... [E]ven on the basis of the Guide alone, the Appellant could and in fact should have realized the necessity to contact the Income Tax Unit at Headquarters, which he did not until 1998. Although it is regrettable that – as it appears – he was never advised to do so when seeking for information on

> **the matter in 1995, it appears reasonable and logical to the Panel that a staff member in the situation of the Appellant addresses the Income Tax/Payroll Unit and not OLA.**
>
> **...**
>
> **75. ... [T]he Panel held that irrespective of the content of the conversations between the Appellant and the Legal Officer, this oral information cannot be considered as legally binding, and therefore cannot impose a legal obligation on the Respondent. ...**
>
> **...**
>
> **Conclusions and Recommendations**
>
> **86. In view of the forgoing, the Panel concludes that by denying the Appellant's request for reimbursement of [United States] taxes, the Respondent acted in accordance with the pertinent Staff regulations and rules, Information Circulars, and established practice.**
>
> **87. Accordingly, the Panel makes no recommendation in support of the present appeal."**

On 28 September 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's findings and conclusion and had decided to take no further action on his appeal.

On 27 November 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. In denying the Applicant reimbursement of national income taxes levied on his UNJSPF withdrawal settlement, the Respondent denied the Applicant his rights under staff regulations 3.3 (f), and 12.1., and General Assembly resolution 34/165.

2. The Respondent did not provide any legal basis for introducing, in ST/IC/1995/3, a new provision relating to UNJSPF "roll-overs" and the consequent vitiation of the Applicant's right to his reimbursement of national taxes, rendering the said new provision *ultra vires*.

3. The Respondent is estopped from alleging that the facts are otherwise than represented to the Applicant in the Guide and in other written and oral information provided to the Applicant by agents of the United Nations acting in their professional capacities. The Respondent is bound by said written and oral information

represented to the Applicant by said agents, in reliance on which the Applicant reasonably acted, to his detriment.

4. The Applicant was not advised to contact the Income Tax Unit, nor was he referred to the relevant Information Circulars. The Applicant reasonably sought the advice of a Legal Officer competent in this area, to whom he was referred.

5. The Guide, to which the Applicant was referred by both the UNJSPF and the Legal Officer, does not contain any caveat as to the reimbursement consequences of "rolling-over" the UNJSPF lump-sum withdrawal.

Whereas the Respondent's principal contentions are:

1. The decision to reject the Applicant's request for reimbursement of United States taxes was in accordance with the pertinent General Assembly resolutions, Staff Regulations and Rules, Information Circulars, and established practice of the Organization.

2. The Income Tax Unit is the competent United Nations office dealing with income tax matters. The Applicant's failure to seek advice from the Income Tax Unit or to follow the provisions of relevant Information Circulars does not engage the responsibility of the Organization.

3. The provisions of paragraphs 86 and 97 of information circulars ST/IC/1995/3 and ST/IC/1996/5 respectively, on payment of income taxes, are lawful and are in no way contrary to General Assembly resolution 34/165 and staff regulation 3.3.

4. The Applicant cannot invoke the principle of estoppel in connection with his case.

The Tribunal, having deliberated from 1 to 23 July 2004, now pronounces the following Judgement:

I. The Applicant, a United States national, joined the Organization in 1976. Following his final assignment as Principal Officer, at the D-1 level, UNHCR, Geneva, effective 15 February 1995, the Applicant was on special leave with full pay.

As a U.S. citizen, the Applicant was not exempt from taxation on United Nations salaries and emoluments, pursuant to the United States reservation to section 18 (b) of the Convention on Privileges and Immunities of the United Nations. The Tribunal notes that in order not to place United States staff members at a disadvantage

compared with their colleagues of other nationalities, the Organization introduced a reimbursement system, the legal basis for which is staff regulation 3.3, which reads, in relevant part, as follows:

> "Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him or her by the United Nations, the Secretary-General is authorized to refund to him or her the amount of staff assessment collected from him or her ..."

II. The Tribunal notes that the Organization issues an annual circular, which is intended to assist staff members who are United States tax payers. These circulars include a chapter on "special provisions relating to staff members who have already separated from the United Nations or who are expecting to separate from the United Nations in [the relevant year]" (the annual tax circular). However, it is clear that the primary issue dealt with by these circulars, is the annual filing for reimbursement of taxes, rather than issues concerning taxation of retirement funds. It is not disputed that, during his service, the Applicant had received the relevant issuances containing the information necessary to facilitate and process the reimbursement of United States taxes by the Organization.

In January 1995, a new rule was introduced in the annual tax circular (ST/IC/1995/3 of 1 January 1995), which stated, *inter alia*, as follows:

> "Retiring staff members who joined the Organization prior to 1 January 1980 are entitled to receive reimbursement for income taxes paid on partial or full lump-sum pension payments and withdrawal settlements received. ... The United Nations will not reimburse any future taxes payable on such distributions if the income tax liability for these amounts is deferred to future years because the staff member has 'rolled over' the payments into another qualifying pension plan or an IRA account."

The Applicant states, and the Respondent does not dispute this, that prior to his retirement he met with an official of the UNJSPF and inquired as to his options vis-à-vis his upcoming retirement funds. The UNJSPF official informed the Applicant of the Guide to National Taxation of United Nations Joint Staff Pension Fund Benefits, With Special Reference to United States Taxes and referred the Applicant to OLA in order to obtain a copy of said document. Subsequently, the Applicant contacted OLA and was referred to one of the legal officers, from whom he sought, and apparently also obtained, advice on this issue. Based on the Applicant's

statement, which is not contested by the Respondent, the Applicant was again referred to, and was provided a copy of the Guide, without mention of any caveat regarding the tax implications of the various options available to him for maximizing the income potential of his retirement funds. Neither was the Applicant informed that he should consult the annual circulars on this matter.

The Guide provides, *inter alia*, the following information:

> "[L]ump sum payments received as a withdrawal settlement ... or as a partial or complete commutation of a retirement benefit ... are considered to constitute part of the terminal payments received by an official, and should therefore be exempt from national taxation to the same extent as salary and other emoluments ... even though some of these payments may not actually be received until some time after separation from service. ... if any tax is imposed on such lump sum payments it will be refunded pursuant to United Nations staff regulation 3.3 (f) to former staff members who had joined the Organization before 1 January 1980, ... on the same basis as taxes imposed on other emoluments ..."

Following his inquiries, the Applicant opted for "rolling over" his withdrawal settlement payment of US$247,673.18 into an IRA. This was done in order to defer tax payment; however, every time there is a withdrawal from that account, it is subject to taxation, at changing rates, depending on the length of time that has elapsed from the deposit of the funds. Early withdrawals are subject to an additional "penalty tax". Some 18 months after rolling over the funds, the Applicant made a withdrawal, at which point he learned that the Organization would not reimburse him the taxes which he incurred as a result of this withdrawal. In rejecting his request for reimbursement, the Director, Accounts Division, OPPBA, informed the Applicant that "in all income tax matters [United States] taxpayers employed by the United Nations must refer to annual administrative issuances of the Income Tax Unit rather than documents issued by other offices".

The Tribunal is of the opinion that, presumably, had the Applicant been aware of this prior to "rolling over" the funds into an IRA, he probably would not have "rolled-over" his payment; rather, he would have received his withdrawal settlement, could have deposited it in a regular account, noted it as income on his tax returns and would have been reimbursed for this tax payment by the Organization in accordance with the relevant rules and procedures.

III. The Tribunal wishes to reiterate that ignorance of the law is no excuse, and that each staff member is bound to know the laws which are applicable to him. To

that effect, the Administration has a duty to, and indeed does, regularly inform its employees concerning the various rules and regulations. It is not disputed that it had done so in the present case, as the annual tax circulars were sent to the Applicant regularly. Therefore, the Tribunal cannot but reaffirm the principle of assumption of knowledge of the law.

Nevertheless, the Tribunal believes that, in complex matters such as those concerning social security, pensions, taxes or other issues of a similar nature, the Administration has to be especially careful. To this end, the Organization should make every effort to promulgate issuances on these issues, ensuring that they are informative and comprehensive, yet simple and easy to understand. Consideration should be given to the special skills which are necessary for understanding rules of such a technical nature, skills which not everyone possesses. It is especially important that this principle is observed when promulgating rules concerning pension rights, which become relevant for staff members at a period when they are particularly vulnerable.

In the circumstances of the case at hand, the Applicant became a victim, partially of his own imprudence and partially of mistakes made by the Administration.

He was imprudent because, instead of consulting with the appropriate office within the Organization, i.e., the Income Tax Unit, he preferred to consult with a staff member who was not authorized to provide advice on United States tax matters, albeit that this was a United States lawyer from OLA. The Tribunal notes that the Applicant was a high level official, who would have been expected to be aware of the issues involved with his United States taxes and the level of care and professional advice that is required in dealing with such matters.

On the other hand, the Administration should not have circulated the Guide without making the necessary amendments to reflect the change in the Organization's rules, as stipulated in ST/IC/1995/3, with wording which is accurate and which would not lead to any confusion. Likewise, neither the UNJSPF, nor any United Nations official, should have provided the Applicant with a copy of the Guide. The relevant text of the Guide, as quoted above, is misleading, because not only does it fail to explain, *expressis verbis,* that under the IRA "roll-over" scheme, the special tax reimbursement offered to United States tax-payers by the Organization does not apply, but worse, it implies the opposite.

Having considered all of the above, the Tribunal concludes that under the circumstances of this case, the parties share the responsibility. However, the Tribunal

finds that the principle that ignorance of the law is no excuse prevails, and therefore the Applicant bears greater responsibility. The Applicant's claim, that he should be reimbursed the taxes which he will have to pay to the United States tax authorities, as a consequence of his decision to "roll-over" his retirement payment to an IRA, is not valid, not only because he should have known the law, but also because such claim is not certain, as it is impossible to predict how much tax he will incur in the future.

IV. The Tribunal therefore decides that the appropriate remedy for the Administration's providing the Applicant with the erroneous information, on which he relied to his detriment, is by way of a one-time compensation. In determining the amount of compensation, the Tribunal considered that the award should not reflect the Applicant's tax liability, but rather the Administration's share of responsibility.

V. In view of the foregoing, the Tribunal orders that:

1. The Applicant be paid the sum US$ 25,000 as compensation; and,
2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary